

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment to §73.202(b))	MM Docket No. <u>00-87</u>
Table of Allotments)	RM-9870
FM Broadcast Stations)	RM-9961
(Brightwood, Madras, Bend and)	
Prineville, Oregon))	

To: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Hunt Broadcasting, Inc. ("Hunt"), by its counsel, hereby submits its Opposition to the Petition for Reconsideration filed by Muddy Broadcasting Company ("Muddy") on November 23, 2001, in the above captioned proceeding. In support of its position, Hunt submits the following:

STANDING

The Report and Order, 16 FCC Rcd 18893 (2001) in this proceeding was released on October 26, 2001 ("R&O"), and allotted Channel 251C1 to Madras, Oregon as that community's first local service. Muddy's Petition for Reconsideration asks the Commission to allot Channel 291C1 to Madras, Oregon instead of Channel 251C1.

On January 24, 2002, Hunt filed a Petition for Rule Making requesting the allotment of Channel 293C3 at Terrebonne, Oregon as that community's first local service. Hunt's engineering exhibit demonstrating the feasibility of the Terrebonne allotment was prepared based on a review of the FCC's FM Table of Allotments as then in effect.

If Muddy's Petition for Reconsideration is granted, and Channel 291C1 is allotted to Madras instead of the presently adopted Channel 251C1, then Hunt's proposed allotment of Channel 293C2 at Terrebonne cannot be considered because Muddy's proposed Channel 291C1 at Madras is mutually exclusive with Hunt's Terrebonne proposal. Therefore, Hunt has standing to file at this juncture in this proceeding.

BACKGROUND

This proceeding commenced with the Commission's issuance of a Notice of Proposed Rule Making, 15 FCC Rcd 8964 (2000) ("Notice"), in response to Muddy's Petition for Rule Making proposing the allotment of Channel 251C3 to Brightwood, Oregon. In response to the Notice, Madras Broadcasting submitted a counterproposal, requesting the allotment of Channel 251C1 at Madras as that community's first local service. The counterproposal also required the Commission to make channel substitutions to existing allotments at Bend and Prineville, Oregon.

Muddy opposed the counterproposal, contending that there were other alternate channels that could be allotted to Madras other than Channel 251C1, which in turn, would allow the Commission to allot a channel to Brightwood as well.

The Commission concluded that neither of the two equivalent channels suggested by Muddy could be used – Channel 291C1 because of massive terrain blocking and Channel 227C1 because it would have required the introduction of a new community, which was prohibited after the expiration of the rulemaking comment period. Since the Brightwood and Madras allotments could not both be made, the Commission was required to compare the relative merits of those two communities and decide which was more deserving of the allotment. The R&O determined that Madras was the superior community for allotment purposes, and the R&O allotted Channel 251C1 to Madras.

MUDDY'S PETITION FOR RECONSIDERATION

Muddy argues that changed circumstances since the last time Muddy was allowed to present information in this proceeding would now allow the allotment of Channel 291C1 to Madras, so Channel 251C3 could be simultaneously allotted to Brightwood as Muddy has originally proposed. Muddy's Petition for Reconsideration must be denied because the information which Muddy claims is "new" was actually available before Muddy filed its response to Madras Broadcasting's counterproposal in this proceeding. Moreover, Muddy's conclusion that Channel 291C1 can be allotted to Madras is not supported by the evidence.

Muddy claims that KSTE-FM, Vancouver, Washington, should now be considered as a Class C2 facility on Channel 290, even though the FM Table of Allotments still lists the Channel 290 allotment at Vancouver as a Class C1. As a Class C1, KSTE-FM was the limiting factor that prevented the allotment of Channel 291C1 to Madras. Muddy claims that sometime between June 15, 2001 and November 20, 2001, the Commission deleted KSTE-FM's Class C1 designation in the "fmfxeng.dat flat file FM database." This deletion, Muddy suggests, means that KSTE-FM is "on the air and permanently downgraded to a C2 (and at a location farther from Madras)." Petition at p.5. Considering KSTE-FM as a Class C2 facility, and using the coordinates Muddy found in the flat file FM database, Muddy suggests there is a way to allot Channel 291C1 to Madras without line of site problems.

There are two problems with Muddy's reasoning. First, the application for KSTE-FM for 290C2 that Muddy relies upon was filed with the Commission on May 30, 2000 and granted on August 24, 2000. See FCC File no. BMPH-20000530ACA. Public Notice of the filing and the grant of this application was made by the FCC, and both of those Public Notices were released *prior to* the FCC's release of the Public Notice announcing the filing of Madras Broadcasting's

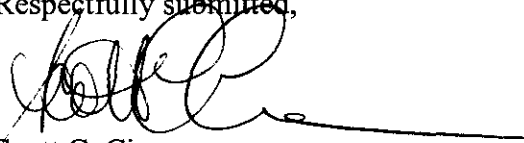
counterproposal to Muddy's Brightwood proposal. Thus, a check of the FCC's official database for KSTE-FM before Muddy filed comments in response to Madras Broadcasting's counterproposal would have revealed the C2 application of KSTE-FM, and Muddy could have raised all of the arguments it is raising at this reconsideration stage *before* the R&O was issued. Muddy's Petition for Reconsideration does not meet the requirements of Section 1.429(b) of the Rules and should be dismissed as procedurally defective.¹ See Littlefield, Arizona, 15 FCC Rcd 21547, 21548 (2000); Margarita, California, 4 FCC Rcd 7887 (1989).

Second, KSTE has not been issued a license for the Class C2 facility yet. Until a license is issued, it is premature to consider KSTE a Class C2 facility. In Winslow, AZ 16 FCC Rcd 9557 (2001), the Commission stated that unlike upgrade applications which trigger an automatic amendment of the Table of Allotments upon grant of the application, downgrade applications do not trigger a change in the Table of Allotments until the license for the downgraded facility is granted. Applying that policy to the instant KSTE-FM situation, the Commission was correct in amending the Table of Allotments to specify Channel 290C1 when the KSTE-FM Class C1 upgrade application was granted. The Commission is also correct in not amending the Table of Allotments to change KSTE-FM's allotment to Channel 290C2 until its license application is granted. Therefore, Muddy's proposal to allot Channel 291C1 to Madras is contingent on the grant of a license for KSTE. Although the KSTE Class C2 license application was filed on April 2, 2001 (BLH-20010402ADV) the application is still pending.

¹ Section 1.429(b) of the Rules provides that petitions for reconsideration relying on facts not previously presented to the Commission will be granted only if: (1) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present those facts to the Commission; (2) the facts relied on were unknown to petitioner until after the last opportunity to present them to the Commission and, the petitioner could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. 47 C.F.R. §1.429(b).

In view of Muddy's failure to satisfy the requirements of Section 1.429(b) of the Rules and the fact that KSTE-FM is still a Class C1 facility, Muddy's Petition for Reconsideration should be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott C. Cinnamon", with a long horizontal line extending to the right.

Scott C. Cinnamon
Counsel for
HUNT BROADCASTING, INC.

February 1, 2002

CERTIFICATE OF SERVICE

I, Scott C. Cinnamon, do hereby certify that on this 1st day of February, 2002, copies of the foregoing document were hand delivered or sent via first-class United States Mail to the following:

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